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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 805–807) is reported at 151 F. 2d 100.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 4, 1945 (R. 808), and a petition for rehearing was denied on September 13, 1945 (R. 809). The petition for a writ of certiorari was filed on October 8, 1945, and granted as to one of the questions presented on January 7, 1946. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether certain of petitioner's books and records relating to his contract with the Navy Department were properly admitted in evidence at his trial for the offense of making a false claim against the Government, after having been obtained by the prosecuton as a result of a prior inspection of petitioner's books and records, made pursuant to the contract, which led to their seizure.

STATUTES INVOLVED

The statutes and executive order which are involved appear in the Appendix, *infra*.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California on Counts 1, 4, and 5 of an indictment returned against him and Lieutenant Commander Lloyd Scott of the United States Navy (R. 2–25, 60–61, 62, 730–731).[1] On appeal to the Circuit Court of Appeals for the Ninth Circuit, the Government consented to a reversal of the conviction

[1] The court directed a verdict of acquittal as to Scott (R. 61).

on the first count on the ground that the indictment was not sufficiently definite and certain to apprise petitioner of the crime charged (R. 805). The circuit court of appeals affirmed the judgment on Counts 4 and 5, by which petitioner was sentenced to imprisonment for nine months on each count, the sentences to run concurrently, and to pay a fine of $2,000 on each count (R. 67–69, 808).

Count 4 charged that, on or about October 16, 1942, the defendants unlawfully presented to the disbursing officer, Bureau of Supplies and Accounts, United States Navy, a claim for payment which was known to be false in that the claim was for $4,000 allegedly paid to William H. McAvoy for services as a test pilot, whereas McAvoy had in fact been paid only $2,375 (R. 8–9). Count 5 charged that defendants unlawfully concealed a material fact and made a false representation in a matter within the jurisdiction of the United States Navy by representing to Hilton Byars, the Navy cost inspector, that $4,000 had been paid to McAvoy and presenting to Byars a cancelled check to McAvoy's order for that sum, whereas, at defendants' request, the check had been endorsed by McAvoy in blank and defendants had filled in the figure of $4,000 and received the proceeds of such check, paying McAvoy only $2,375 (R. 9–11).

The evidence for the Government on these counts may be summarized as follows:

Petitioner entered into a contract with the Navy Department (No. 83142) under which he was to do experimental work on airplane wings, being paid in part on a cost plus fixed fee basis (Gov. Ex. 3, R. 282–284). In January 1942, in a letter to the resident inspector of naval aircraft, petitioner called attention to the fact that no provision had been made for preliminary flight demonstrations and submitted an estimate of the cost of test flights (R. 284–287; Gov. Ex. 49, R. 482–484). In June 1942, the Navy Department approved a modification of the contract to provide for test flights, payment to be made at cost plus a fixed fee (R. 288–289). In his estimate of the probable cost of the flights, petitioner listed the cost of a test pilot's fee and insurance at $4,000 (R. 483). At that time, he had already agreed to pay test pilot McAvoy between $2,000 and $2,500 for making the tests (R. 639). McAvoy did make test flights (R. 306–308) and received approximately $2,500 from petitioner (R. 302–304, 309–310, 607). He signed a statement acknowledging "final payment in full" for his test flight services without specifying the amount received (Gov. Ex. 6, R. 303–304).

A day or two before petitioner and McAvoy went to Daggatt Field for the test flights, petitioner asked McAvoy to endorse a blank check, telling him that the check was to be used to cover the general expenses of the trip. McAvoy endorsed the check and returned it to petitioner (R. 300–

302). Petitioner's bookkeeper, Ethel Boyle, had given the check to Thomas C. Browne, petitioner's auditor, on September 23; it was blank except for the date typed on the check (R. 466). On October 13, petitioner gave it back to Miss Boyle still blank, except for the date, McAvoy's endorsement, and petitioner's signature, and told her to fill it in (R. 466). Browne instructed her to fill in McAvoy's name as payee and $4,000 as the amount (R. 466–468, 554–555). The check was then deposited in petitioner's account (R. 466, 555). It was posted in petitioner's books of account as a payment to McAvoy (R. 429–430, 453).

In October 1942, petitioner presented to the Navy Department a voucher for "work on a cost-plus-a-fixed-fee basis under contract No. 83142," which listed "Other Direct Charges—$4,300" (Gov. Ex. 19, R. 362–363). Supporting the claim was a document bearing petitioner's signature in which he certified that he had paid $4,000 to McAvoy by "check, 4679, dated 9-23-42" (R. 363), that being the number and date of the check endorsed by McAvoy in blank (R. 301; Gov. Ex. 7, R. 316).

This Court has limited certiorari to the question of whether books and records relating to petitioner's contract with the Navy Department [i. e., Gov. Ex. 7, the $4,000 check endorsed in blank by McAvoy (R. 316) and Gov. Exs. 34–45, petitioner's business records (R. 421–426)] were

properly admitted in evidence. The facts on this issue were developed in affidavits submitted on petitioner's motion to suppress, and so far as relevant to the issue here presented[2] are as follows:

From October 20 to December 1, 1942, two F. B. I. agents, Myerson and Sloane, conducted an audit of petitioner's books and records at his place of business during business hours under the auspices and by the authority of a senior accountant and a cost inspector of the Navy under whose jurisdiction petitioner's books and records had been placed for the purpose of inspection (R. 192–195). The affidavit of Miss Boyle, petitioner's bookkeeper, submitted by petitioner on his motion to suppress, indicates that she cooperated with the agents by supplying records and furnishing requested information (R. 154–155). Petitioner stated in his affidavit that on November 6, 1942, he protested to the agents that they had no right to examine his books (R. 148–149), but also stated that thereafter he saw the agents continue

[2] Petitioner's affidavits refer to two search warrants issued on October 31, 1942, one for the search of his apartment and one for the search of his business premises (R. 179–186; see R. 129–130, 136–137, 140–146). The Government consented to the entry of an order suppressing the evidence taken from petitioner's apartment on the ground that the address given in the warrant was incorrect (R. 190–203–204, see also R. 196–197). The evidence taken from petitioner's place of business under the warrant of October 31, 1942, was not used at the trial.

their examination with the assistance of his employees (R. 149–150). The books and records remained in the custody of the Navy during the investigation (R. 194–195). During the investigation, about November 5, 1942, Myerson asked the bookkeeper for the $4,000 check to test pilot McAvoy (Gov. Ex. 7). She showed him the check in the file and at his request gave it to him. (R. 155). On December 1, 1942, Myerson applied for a search warrant of the business premises, stating in his affidavit that he had been on the premises by reason of a previous search warrant and had observed certain books and records, which he identified (R. 177–179). On the basis of this affidavit, a search warrant was issued, and on the same day the specified checks and records were seized (R. 174–177). Government's Exhibit 7, the $4,000 check, is not specifically mentioned in the return, but the request for the warrant and the warrant itself refer to all cancelled checks of the company and of petitioner personally (R. 175, 178). The return covered cancelled checks for the period from March to November 1942 (R. 177), which includes the date of Government's Exhibit 7 (R. 317).[3]

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[3] In the petition (p. 7) and brief in opposition (p. 12), as in the Government's brief in the court below, it is stated that the check was retained by the F. B. I. agent to whom it was handed by the bookkeeper. This fact is not reflected in the record, which we have followed in the statement in the text. As will appear, we regard it as immaterial whether

The district judge denied the motion to suppress as to the records here involved (R. 203–204). At the trial, petitioner did not object to the introduction of Government's Exhibit 7 (R. 316) but subsequently moved to have the exhibit stricken on the ground that it was illegally obtained (R. 379–380). He objected to the introduction in evidence of his books and records, alleged to have been unlawfully seized (R. 419–421).

SUMMARY OF ARGUMENT

I

The inspection of petitioner's books and records was lawfully conducted without infringing his privilege against self-incrimination under the Fifth Amendment or his right to privacy under the Fourth. Since, by statute and by contract, petitioner was required to keep the books and records relating to his contract with the Navy Department open for inspection, the documents are not within the privilege against self-incrimination. There was no violation of the Fourth Amendment, for the inspection was peacably made with the consent of petitioner and his responsible employees. The F. B. I. agents who conducted the audit were acting under the juris-

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the check was retained by the investigator or seized pursuant to the search warrant; but if the difference should be regarded as significant we do not contend that the fact was otherwise than has heretofore been assumed.

diction and by the authority of officers of the Navy Department to whom the books and records were turned over for examination. Since there was no violation of petitioner's constitutional rights, information obtained from the records, and the records themselves if not unlawfully obtained, could properly be used against petitioner at the trial.

II

Although the search warrant by which physical possession of the records was obtained was defective in failing to set forth facts showing probable cause to believe that petitioner had committed an offense, the denial of petitioner's motion to suppress was proper. The exhibits which are here involved were the means by which petitioner both perpetrated and concealed his fraud upon the Navy Department and hence were instrumentalities of a crime. As such, they were subject to seizure upon being discovered in the course of an inspection which did not involve an invasion of petitioner's right to privacy. Consequently a warrant was unnecessary and defects in the one that was used are immaterial.

III

Even if a search warrant were necessary in order to obtain physical custody of the documents, the defect in the affidavit by which the warrant was obtained amounts to no more than a technical

error, since the deficiency in the warrant affected only the right to retain the physical custody of the documents and not the right to use the information obtained therefrom. The only relief to which petitioner would have been entitled on his motion to suppress would have been the return of the documents, not the suppression of evidence based upon them. Had the motion been granted, a second warrant could thereafter have been obtained, for the Government would not have been obliged to use information obtained by means of the defective warrant in swearing out a new one. The function of the warrant in this case was different from the usual one, since here the warrant was not the means of invading privacy but merely the means of obtaining for use in court documents which the prosecution was entitled to have and to use as evidence.

ARGUMENT

I

THE INSPECTION OF PETITIONER'S BOOKS AND RECORDS WAS PROPER AND INFORMATION OBTAINED THEREBY COULD PROPERLY BE USED IN EVIDENCE AGAINST HIM

Petitioner voluntarily entered into a contract with the Navy Department to perform certain services for the Government for which he was to be paid on the basis of cost plus a fixed fee. Congress has broad power to fix the terms and condi-

tions upon which the United States will enter into such contracts, *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. One of the conditions imposed by statute with respect to petitioner's contract (10 U. S. C. 310 (1) and 50 U. S. C. App., Supp. IV, sec. 643, *infra*, pp. 27–28) was that relevant books and records were to be open for government inspection. Petitioner accepted this condition by entering into the contract, and further expressly agreed to a clause which provided that—

> The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government. [Gov. Ex. 3, R. 282–284.]

We think it is clear that the privilege against self-incrimination conferred by the Fifth Amendment does not apply to the books and records here involved, all of which related to petitioner's contract with the Navy Department. There is a long line of cases to the effect that, where books and records are required by law to be kept, such documents are not within the privilege. See the cases collected in Wigmore, *Evidence* (3d ed., 1940, Sec. 2259c). This Court in *Boyd* v. *United States*, 116 U. S. 616, 623–624, distinguished in this connection records required by law to be kept and purely private papers. The same distinction was reiter-

ated in *Wilson* v. *United States*, 221 U. S. 361, 380,[4] and *Gouled* v. *United States*, 255 U. S. 298, 308, and has been enunciated in many lower court decisions. *Bowles* v. *Insel*, 148 F. 2d 91, 93 (C. C. A. 3); *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 571 (C. C. A. 9), certiorari denied, 325 U. S. 877; *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774, 779 (C. C. A. 10); *Cudmore* v. *Bowles*, 145 F. 2d 697 (App. D. C.), certiorari denied, 324 U. S. 841; *Rodgers* v. *United States*, 138 F. 2d 992, 995–996 (C. C. A. 6); *In re Sana Laboratories*, 115 F. 2d 717, 718 (C. C. A. 3), certiorari denied, 312 U. S.

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[4] This Court there said:

"But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd Case* where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. * * * The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulations and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."

688; *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384, 388–392 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Bartlett Frazier Co.* v. *Hyde*, 65 F. 2d 350, 351–352 (C. C. A. 7), certiorari denied, 290 U. S. 654; *Spring Drug Co.* v. *United States*, 12 F. 2d 852, 857 (C. C. A. 8); *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, 789 (C. C. A. 3), certiorari denied, 268 U. S. 688; *United States* v. *Kempe*, 59 F. Supp. 905, 909 (N. D. Iowa); *Bowles* v. *Stitzinger*, 59 F. Supp. 94, 95 (W. D. Pa.); *United States* v. *Rabicoff*, 55 F. Supp. 88, 89 (W. D. Mo.); *Bowles* v. *Chew*, 53 F. Supp. 787, 790 (N. D. Cal.); *United States* v. *Sherry*, 294 Fed. 684 (N. D. Ill.); *United States* v. *Mulligan*, 268 Fed. 893 (N. D. N. Y.). The records here involved even more clearly fall outside the scope of the privilege, for petitioner agreed to keep them open for inspection, not only by application of law, but by his voluntary contract. The privilege against self-incrimination may be waived and, by his contract, petitioner did waive it as to books and records relating to the contract.

We do not contend that the Fourth Amendment, in so far as it protects petitioner from unlawful invasion of his privacy, is inapplicable.[5]

[5] The principle that an unreasonable compulsory production of documents is a violation of the Fourth as well as the Fifth Amendment (*Boyd* v. *United States*, 116 U. S. 616; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298) has no relevance here, for it is clear that there is

Even when government officers are entitled to examine books and records as a matter of right, they may not, without benefit of legal process, break into an establishment in order to exercise that right. Cf. *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 364. However, the affidavits submitted on petitioner's motion to suppress establish that no forcible or otherwise improper invasion of petitioner's right of privacy was involved in the initial inspection and audit of his books and papers. The affidavit of Hilton Byars, the Navy accountant, alleges that petitioner's books and records had been placed in the custody of the Navy Department for inspection and audit, which was carried out by the F. B. I. inspectors by authority of the Navy's contracting officer (R. 193–194); and petitioner does not deny that he consented to the audit of his books by the Navy Department. Furthermore, the affidavit of petitioner's bookkeeper establishes that she cooperated with the agents by supplying records and furnishing requested information (R. 154–155). Although petitioner states in his affidavit that on November 6, while the inspection was already in progress, he protested that the agents had no power to examine his records, he admits that his employees continued in his presence to fur-

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no search of unreasonable scope involved in requiring petitioner to fulfill the terms of his contract by submitting to the examination of records relating to the contract. See *Endicott Johnson Corporation* v. *Perkins*, 317 U. S. 501, 510.

nish such information to the inspectors as was requested (R. 148–150).

Petitioner's contention that the audit of his books involved an unreasonable search is predicated on his argument that F. B. I. agents are not persons authorized to conduct examinations under Executive Order 9127 (see Appendix, *infra*, pp. 28–29), whereby the President designated certain agencies to exercise the power of inspection conferred by Title XIII of the Second War Powers Act (50 U. S. C. App., Supp. IV, 643, *infra*, pp. 27–28). However, the F. B. I. agents were acting under the auspices and by the authority of the Navy Department, one of the departments designated in the Executive Order, and, we submit, petitioner cannot question the authority of the Navy to use such personnel as it chose. Cf. *Cravens* v. *United States*, 62 F. 2d 261, 265 (C. C. A. 8), certiorari denied, 289 U. S. 733, holding that the fact that agents of the Department of Justice accompanied land bank examiners did not render inspection by the examiners invalid. Moreover, petitioner agreed by contract to keep his records "open at all times to the Government and its representatives" without limitation, thus conferring a right of inspection broader than may have been established by the statute.

In the light of the foregoing, we submit that the inspection of petitioner's books and records

involved no infringement of his privilege against self-incrimination under the Fifth Amendment or his right to privacy under the Fourth, and the information obtained therefrom, including the records themselves if not improperly obtained, could be used against him at his trial.

II

THE DEFICIENCIES IN THE SEARCH WARRANT BY WHICH THE BOOKS AND RECORDS WERE OBTAINED ARE IMMATERIAL SINCE THE RECORDS, AS INSTRUMENTALITIES OF THE CRIME DISCOVERED IN THE COURSE OF A LAWFUL INSPECTION, COULD PROPERLY BE SEIZED WITHOUT A WARRANT

At petitioner's trial the Government did not merely use the information obtained from its inspection of petitioner's books and records; it produced the records themselves as exhibits in court. Petitioner claims that the methods by which physical possession of the documents was obtained, i. e., alleged retention of the check to McAvoy and the search warrant of December 1, 1942, were illegal, and that such illegality required the court to suppress all use of the documents as evidence. We concede that the affidavit on which the search warrant of December 1 was based was defective in that it failed to set forth facts showing probable cause to believe that petitioner had committed an offense, and that, although it appears from the warrant that the Commissioner was informed that there was reason to believe that peti-

tioner had violated 18 U. S. C. 80 and 83 (R. 174–175), the deficiency in the affidavit renders the warrant invalid. *Grau* v. *United States,* 287 U. S. 124; *Siden* v. *United States,* 9 F. 2d 241, 243 (C. C. A. 8).

We submit, nevertheless, that the denial of petitioner's motion to suppress was proper. The exhibits which are here involved were instrumentalities of a crime. Exhibit 7, the $4,000 check to McAvoy, had no reason for existence other than as a means to defraud the United States by making it appear that petitioner had paid McAvoy about $1,500 more than McAvoy actually received. The other records were the means by which this fraud was made to appear legitimate in the business records open to inspection by the Navy Department and hence were also property used as a means of committing a felony.[6] *Marron* v. *United States,* 275 U. S. 192, 199; *United States* v. *Lindenfeld,* 142 F. 2d 829 (C. C. A. 2), certiorari denied; 323 U. S. 761. As such they have the status of contraband, i. e., they are articles which the

[6] Exhibit 7 was, unquestionably, the most important of the exhibits used to establish the counts under which petitioner was convicted. The other exhibits, business records, were introduced *seriatim* (R. 421–426) and merely completed the picture by showing that the check was reflected on petitioner's books of account (R. 429–430, 453). These exhibits were not significant, since the vouchers filed by petitioner with the Navy Department (Government Exhibit 19) in themselves show that petitioner based his $4,000 claim on check No. 4679, i. e., Exhibit 7 (R. 362–363).

defendant has no right to retain and the Government has a right to take.

Where in the course of a peaceable and lawful inspection, government officers discover an article which is an instrumentality of a crime, they are justified in seizing the article immediately without a search warrant. It is well established that, as incident to a lawful arrest, officers may search and seize instrumentalities of the crime for which the arrest is made. *Marron* v. *United States,* 275 U. S. 192, 199; *Agnello* v. *United States,* 269 U. S. 20, 30. If, in the course of such a search, they come upon instrumentalities of a wholly different crime, such articles may also be seized. *Harris* v. *United States,* 151 F. 2d 837 (C. C. A. 10), certiorari pending, No. 700, this Term; *Matthews* v. *Correa,* 135 F. 2d 534 (C. C. A. 2); *Shelton* v. *United States,* 50 F. 2d 405 (C. C. A. 6). The same principle has been applied where instrumentalities of crime have been discovered by officers in the course of other lawful investigations. *Bennett* v. *United States,* 145 F. 2d 270 (C. C. A. 4), certiorari denied, 323 U. S. 788; *United States* v. *Old Dominion Warehouse, Inc.,* 10 F. 2d 736 (C. C. A. 2); *United States* v. *Camorata,* 278 Fed. 388 (S. D. Cal.) (articles seized not mentioned in the search warrant by which entry was obtained); *Milam* v. *United States,* 296 Fed. 629 (C. C. A. 5) certiorari denied, 265 U. S. 586 (unlawfully imported aliens discovered in a truck

which was stopped on reasonable grounds to believe that it was carrying liquor); *In re 14 East 17th Street,* 65 F. 2d 289 (C. C. A. 2) (smuggled goods discovered after entry by consent); *United States* v. *Two Soaking Units,* 48 F. 2d 107 (C. C. A. 2), certiorari denied, 284 U. S. 627; *Hilsinger* v. *United States,* 2 F. 2d 241, 243 (C. C. A. 6), certiorari denied, 266 U. S. 622 (contraband discovered during lawful inspection). The facts here fall within the rationale of these cases. During the course of a lawful inspection, government investigators discovered a gross fraud against the United States perpetrated by means of Exhibit 7 and the books in which that check was reflected. Unquestionably, the officers could have testified to what they found. As Judge Parker stated in *Paper* v. *United States,* 53 F. 2d 184 (C. C. A. 4), in which testimony by officers that they had found liquor while searching for defendant in order to arrest him, was held admissible—

> The purpose of the Fourth Amendment was to prevent the use of "governmental force" to search a man's house, his person, his papers or his effects and to prevent their seizure against his will. *Olmstead* v. *U. S.,* 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376. Most cases of search in violation of this constitutional provision involve the element of trespass, i. e. the entry without right upon the prem-

> ises of the citizen. And all cases of unlawful search will be found to involve either this element or some element of fraud or subterfuge, as where an arrest is made a pretext for a search, or where the right to search having been obtained ostensibly for one purpose is used in reality for another. *Henderson* v. *U. S.* (C. C. A. 4th), 12 F. (2d) 528, 51 A. L. R. 420; *Thompson* v. *U. S.* (C. C. A. 4th), 22 F. (2d) 134. But where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of the citizen, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers, in this case, had discovered in the cellar a counterfeiting plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?

By the same token, the officers in the circumstances supposed would have been justified in seizing the liquor as contraband. Where officers discover the instrumentalities of a crime in the course of a lawful search they are not obliged to take the risk that such instrumentalities will be altered or destroyed. As Judge Hand stated in *United States* v. *Old Dominion Warehouse, Inc., supra*, 10 Fed. at 738:

> If we suppose the case of goods which we are more used to thinking of as inher-

> ently contraband, like a burglar's kit, or counterfeiting paraphernalia, the case appears to us plain. We cannot suppose that, if an officer entered lawfully upon a warrant limited to certain described articles of this kind, he would not be justified in taking without warrant any others which he might chance upon in the premises. His seizure would not depend upon the warrant, but upon the fact that they were in their nature caput lupi; it would be as little an "unreasonable seizure" as to take property from a person arrested. * * *

The fact that books and records are here involved, rather than illicit liquor or other property more patently tainted with illegality, does not affect the outcome. As we shall show (*infra*, pp. 22–26), evidence lawfully derived even from records which are not instrumentalities of crime may be used in a criminal trial. Where the records are themselves the means of committing the crime they are essentially contraband and may be taken and used.

In this case, the entry into petitioner's premises was lawful; the books examined were those which petitioner by law and by contract was required to keep open for inspection; the records taken were those which petitioner had, through his own act, rendered subject to seizure as a means of committing a felony. *United States* v. *Sherry*, 294 Fed. 684 (N. D. Ill.). As such we think they were subject to seizure without a warrant

when they were discovered or at any subsequent time when access to them could be obtained peaceably. The warrant of December 1, 1942 was therefore unnecessary, and its invalidity is immaterial.

III

ASSUMING THAT A SEARCH WARRANT WAS NECESSARY IN ORDER TO OBTAIN PHYSICAL POSSESSION OF THE RECORDS, THE DEFICIENCY IN THE AFFIDAVIT ON WHICH THE WARRANT WAS BASED WAS A TECHNICAL ERROR WHICH DID NOT JUSTIFY SUPPRESSION OF THE USE OF THE DOCUMENTS AS EVIDENCE

Even if the F. B. I. agents would not have had authority to take physical possession of the documents here involved without legal process, we think that the deficiency in the warrant by which possession was obtained, together with retention of the check if it occurred, is merely a formal defect under the facts of this case; that the deficiency, if noted on petitioner's motion to suppress, could have been corrected and production of the documents compelled; and hence that admission of the records does not constitute reversible error.

The inspection of petitioner's books and records was lawful, as we have shown. The deficiency in the warrant thus would have affected at most the right to physical custody of the documents, and not the right to the information obtained therefrom. The only relief to which petitioner

would have been entitled on his motion to suppress would have been the return of the documents; the court would not have been warranted in suppressing evidence based upon them. See *In re Sana Laboratories,* 115 F. 2d 717, 718 (C. C. A. 3), certiorari denied, 312 U. S. 688, in which documents seized during the course of a lawful inspection were ordered returned but information obtained therefrom was not suppressed. As the Third Circuit held in that case:

> * * * If the subsequent seizure and removal from the premises were unlawful because the petitioners were entitled to the possession of the documents, this wrong has been cured by the return of the papers under the order rendered by the trial court. But the removal from the premises of papers which government agents were, under the circumstances, entitled to inspect upon the premises did not render sacrosanct information secured from these papers because it was lawfully open to the government. It is only knowledge gained by the government's own wrong which cannot be used.

See also *United States* v. *Lee,* 274 U. S. 559, 563, in which this Court ruled that "A later trespass by the officers, if any, did not render inadmissible in evidence knowledge legally obtained."

If the documents had been returned to petitioner on his motion to suppress, possession could thereafter have been obtained by means of a sec-

ond warrant. As we have shown (*supra*, p. 17–18), the documents were the instrumentalities of a crime and thus property "used as the means of committing a felony" within the purview of the Search Warrant Act (18 U. S. C. 612, *infra*, p. 30). Information as to the commission of a crime by petitioner and knowledge of the records as the means of committing it were obtained, not by means of the invalid warrant, but through the lawful inspection of petitioner's records. In applying for a second warrant the Government would not have been obliged to use knowledge gained by its own wrong, but would have relied upon information secured by the prior investigation. Cf. *Nardone* v. *United States*, 308 U. S. 338, 341; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. Hence, a second warrant could lawfully have been issued and the records again seized and introduced as evidence before the conclusion of the trial. See *Parts Mfg. Corp.* v. *Lynch*, 45 F. Supp. 854 (S. D. N. Y.), affirmed 129 F. 2d 841 (C. C. A. 2), certiorari denied, 317 U. S. 674. In view of this fact, we think that the trial judge could properly disregard the illegality in the affidavit by which the warrant was obtained and that, in any event, his failure to do so was not prejudicial error, since the records could in any event have been produced in court by proper means.

The function of the search warrant in this case was different from the usual purpose of such war-

rants.. Normally a search warrant is the means by which government officers obtain the right to invade a person's privacy and to enter a place where they would otherwise have no right to be. When a warrant used for such a purpose is defective, the result is an illegal invasion of the fundamental right to privacy, and the evidence is suppressed on the theory that the Government may not profit from its own wrongdoing. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392. Here, however, the warrant, if needed, was merely the means of bringing into court records which were not privileged and which had already been lawfully examined without violating the right to privacy. Had the Government not taken possession of the documents, the officers could nevertheless have testified to what they found. *Paper* v. *United States,* 53 F. 2d 184 (C. C. A. 4), *supra,* p. 19-20. Had they taken photostats during the course of the examination, the photostats could have been offered in evidence without producing the originals. *Darby* v. *United States,* 132 F. 2d 928 (C. C. A. 5); *Lisansky* v. *United States,* 31 F. 2d 846, 850 (C. C. A. 4), certiorari denied, 279 U. S. 873; *Madden* v. *United States,* 20 F. 2d 289, 294 (C. C. A. 9), certiorari denied, *sub nom. Parente* v. *United States,* 275 U. S. 554. The search warrant here was merely the means of insuring production in court of the primary source of evidence otherwise admissible. Under

such circumstances, the reason for the observance of strict rules in determining the validity of warrants does not exist. Since there was no wrongdoing in the method by which relevant information was obtained from the exhibits, we submit that the technical deficiency in the method by which the exhibits were brougt into court could properly be disregarded by the trial judge.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX

Section 10 (1) of the Act of July 2, 1926, c. 721, 44 Stat. 784, 10 U. S. C. 10 (l), provides:

> The manufacturing plant, and books, of any contractor for furnishing or constructing aircraft, aircraft parts, or aeronautical accessories, for the War Department or the Navy Department, or such part of any manufacturing plant as may be so engaged, shall at all times be subject to inspection and audit by any person designated by the head of any executive department of the Government.

Title XIII, Section 1301 of the Second War Powers Act of March 27, 1942, 56 Stat. 185, 50 U. S. C. App. Supp. IV, sec. 643, provides:

> The provisions of section 10 (*l*) of an Act approved July 2, 1926 (44 Stat. 787; 10 U. S. C. § 310 (*l*) (giving the Government the right to inspect the plant and audit the books of certain Contractors), shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war: *Provided*, That, for the purpose of this title, the term "defense contract" shall mean any contract, subcontract, or order placed in furtherance of the defense or war effort: *and provided further*, That the inspection and audit authorized herein, and the determination whether a given contract is a "defense con-

tract" as defined above, shall be made by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board.

Executive Order 9127 issued April 10, 1942 (7 F. R. 2753 provides:

> By virtue of the authority vested in me by the Constitution and laws of the United States, and particularly by Title I of the First War Powers Act, 1941, and Title XIII of the Second War Powers Act, 1942, as President of the United States and Commander in Chief of the Army and Navy of the United States, and in order to prevent the accumulation of unreasonable profits, to avoid waste of Government funds, and to implement other measures which have been undertaken to forestall price rises and inflation, it is hereby ordered as follows:
>
> 1. I hereby designate the War Production Board, the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation as the governmental agencies authorized to inspect the plant and to audit the books and records, as provided by Title XIII of the said Second War Powers Act, 1942. Such inspection and audit and the determination whether a given contract is a defense contract, as defined in Title XIII of the Second War Powers Act, 1942, may be made in the case of (a) any contractor with whom a defense contract has been placed by such agency, or, in the case of the Reconstruction Finance Corporation, by any corporation created or organized by it, at any time after

the declaration of emergency on September 8, 1939, and before the termination of the present war, and in the case of (b) any subcontractor performing work required by any such defense contract. The Chairman of the War Production Board is authorized to issue rules and regulations and to establish policies to coordinate and govern the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation in exercising the functions vested in them by this order.

2. The authority herein conferred may be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes. The Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, or the Board of Directors of the Reconstruction Finance Corporation may authorize such officer or officers or civilian officials of their respective departments or agencies to make further delegations of such powers and authority within their respective departments and agencies.

The Search Warrant Act, Title XI of the Espionage Act of June 15, 1917, 40 Stat. 228, 18 U. S. C. 611 et seq., provides in pertinent part as follows:

> SEC. 2. A search warrant may be issued under this title upon either of the following grounds:
>
> 1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.
>
> 2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.
>
> * * * * * *
>
> SEC. 3. A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.
>
> SEC. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.
>
> SEC. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

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